SUPREME COURT OF THE UNITED STATES.

No. 507.—October Term, 1926.

Arnold J. Hellmich, United States Collector of Internal Revenue, Petitioner, vs. Missouri Pacific Railroad Company.	Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

[February 21, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

The Missouri Pacific Railroad Company brought this suit in the United States District Court for the Eastern District of Missouri against Hellmich, U. S. Collector of Internal Revenue, to recover taxes amounting to $14,792.95, paid by it under protest, for the transmission of telegraph messages from March, 1920, to January, 1923, inclusive. The messages in question were transmitted under the terms of a contract dated October 24, 1911, for the exchange of services between the Western Union Telegraph Company, on the one part, and the Missouri Pacific Railroad Company and the St. Louis, Iron Mountain & Southern Railway Company, on the other part. To the rights and obligations of these two railway companies the respondent company, the Missouri Pacific Railroad Company, succeeded. The question of the legality of the taxes arises under two acts of Congress. The first is the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1101 and 1102, which provides in its section 500,

"That from and after April 1, 1919, there shall be levied, assessed, collected and paid, in lieu of the taxes imposed by Section 500 of the Revenue Act of 1917—

"(f) In the case of each telegraph, telephone, cable or radio, dispatch, message, or conversation, which originates on or after such date within the United States, and for the transmission of which the charge is more than 14 cents, and not more than 50 cents, a tax of 5 cents; and if the charge is more than 50 cents, a tax of

10 cents: Provided, That only one payment of such tax shall be required, notwithstanding the lines or stations of one or more persons are used for the transmission of such dispatch, message, or conversation.

"Section 501 (2). That the taxes imposed by Section 500 shall be paid by the person paying for the services or facilities rendered."

The second is the Revenue Act of 1921, c. 136, 42 Stat. 227, 284, sections 500 and 501 of which contain exactly the same language as that just quoted from the Act of 1918.

The District Court held that the messages here in question came within these sections and gave judgment for the Government. The Circuit Court of Appeals of the Eighth Circuit reversed the District Court, holding that the telegraph messages up to the amount of $75,000 annually thus taxed were exempt, but that those in excess of that amount were subject to the tax.

The point in the case is to determine whether these messages can be construed to be messages for the transmission of which there can be said to be a charge. The contention of the railroad company is that in the sense of this section 500, the messages in question are not charged for at all, that they can not be fitted into the section, so that it can not be construed to cover them. We must, therefore, consider the contract under which the messages for the railroad company were sent by the telegraph company. The contract was dated October 24, 1911, and is of indefinite duration. By its fourth paragraph, the telegraph company agrees to perform, for the railway companies, telegraphic service between points on its lines in the United States, either on or off the lines of the railways covered by this agreement, as the railway companies may desire, for messages pertaining to their railroad business, under franks issued to their officers and agents permitting all classes of messages and telegraphic letters in public use on the lines of the telegraph company. The railway companies agree to perform promptly such transportation and distribution service over their railroads as the telegraph company may require for its employees, supplies, and material, whether for work or use along the railroads or beyond or off their lines, and to furnish special trains, engines, crews and equipment for distribution service and outfit, boarding and tool cars for work on their lines, whenever required by the telegraph company. The transportation of employees is to be authorized by

passes to be issued by the railway companies on authorized request. The service performed by either party for the other is to be charged for at its regular current telegraph rates, or its through or local transportation rates, as the case may be, for the class of services rendered. Services performed by either party for the other for which there are no regular or published rates, and not otherwise provided for in this agreement, are to be charged for at actual cost, as determined by the officers of the party rendering the service, plus not exceeding 25 per cent. of such cost. At the close of each contract year, bills are to be rendered by each party to the other for all services performed by each party for the other during such year. If the bill therefor rendered by either party to the other exceeds the sum of $75,000 in any contract year, the party receiving such service is to pay to the party rendering the same the amount of such excess, provided that in the event the services of both are in excess of $75,000 in any contract year, the party in arrears is to pay to the other party the difference between the amounts of such accounts; and if the bills rendered by each party to the other for such services in any contract year do not exceed $75,000, there is to be no payment by either party to the other therefor.

By the fifth paragraph of the contract, it is provided that the telegraph or telephone operators of the railway companies at stations where the messages are less in number than 3,000 a year, are to act as the agents of the telegraph company and receive and transmit them, charging the tariff rates and rendering to the telephone company monthly statements of the business, and are to pay the receipts therefor to the telegraph company, but the railway companies are not to be liable for receipts thus to be received and paid over. The railway operators and employees in such service are to conform to the rules and regulations of the telegraph company. They are not to transmit over the wires of either party any free messages except those of the railway company's business. For messages transmitted for it by the employees of the railway company the telegraph company agrees to pay the railway companies 10 per cent. of the gross cash receipts, except on ocean cable messages, receipts for which are to be retained in full by the telegraph company.

Pursuant to the authority vested in him by the Revenue Acts, the Commissioner of Internal Revenue, with the approval of the Treasury, promulgated Article IX of Regulation No. 57 of the

sation to be paid by each for the service of the other would not average more than the same sum. The contract was a contract for many years, the amount of the service on the one hand and on the other might vary from year to year, but year in and year out the two companies felt that $75,000 would be a safe sum for both. In exceptional years if either had the advantage beyond $75,000, this should be made up for by the actual payment of cash for the excess of the party earning it.

In argument, extreme instances for a single year were supposed such that as between the two contracting parties no transportation would be furnished and so no compensation would be received by the telegraph company for the messages actually sent by it. Such a hypothesis is not a test of the actual equilateral character of the contract in its reciprocal obligations. $75,000, in the experience and judgment of the parties, measured the probable annual need of each for the service of the other. This was deemed a fair balance between the two, agreed upon for their mutual convenience of settlement. The contract was made long before the income tax was imposed, and we must treat it as having been the result of transactions of previous years and justified by similar experiences of other railroads and telegraph companies. Such contracts between railroads and telegraph lines were and are very frequent. *Postal Telegraph and Cable Company* v. *Tonopah Railroad Company*, 248 U. S. 471. The payment of charges for telegrams or shipments or other services was a mere substitute for the payment of the money down at the time each message was sent or each shipment made or other service was performed. Certainly no one would say that because a patron of the telegraph company paid his bills once a year, it rendered them free from taxation. The arrangement here is not substantially different. The payment for the messages, i. e., the charge for them to satisfy the statute should be for money or money's worth and that is what we think this contract in its ultimate and general result amounted to.

Some elaborate arguments have been made against this conclusion. The Circuit Court of Appeals' view was that this was a mere swapping of free privileges and was not a service for a money charge. We do not think the privileges were free. We think that the one for messages was set off against the one for transportation, and that the one paid for the other.

The counsel for the respondent insist that our decision in *Postal Telegraph & Cable Company* v. *Tonopah and Tidewater Railroad Company, supra,* is inconsistent with our present conclusion. That case concerned the right of telegraph companies to recover against railroad companies for telegraph messages on contracts like the one here in question. The defense was that such contracts for an exchange of service while valid under the Interstate Commerce law for messages and transportation on or along the line, were invalid as to messages or transportation service beyond the railway lines. The Interstate Commerce Commission had held that such extras must be charged for by the railroad upon the basis of its published rates, and by the telegraph company upon reasonable rates as charged to other customers for similar service. It arose under the amendment to the Interstate Commerce Act of June 18, 1910, c. 309, sec. 7, which, in bringing in under the interstate commerce law telegraph and telephone and cable companes, provided "that nothing in the act should be construed to prevent telephone, telegraph and cable companies from entering into contracts with common cariers for the exchange of services." It was held that this proviso was general enough to allow an exchange of services off the lines as well as services on them to be exchanged. The court said that the railroad and telegraph had grown together in mutual dependence and that contracts of this sort for long terms had been nearly universal for fifty years, that as it was feared that such contracts would be unlawful if the telegraph companies were brought within the law, the amendment of 1910 was passed. This Court's conclusion was that under the contract all the great benefits on one side were consideration for all those conferred upon the other, and that Congress probably allowed the exchange because it had been frequently advised by the Commission that full performance of the exchange would not affect any public or private interest adversely. Speaking of the meaning of exchange, the Court said (p. 474):

"But exchange is a barter and carries with it no implication of reduction to money as common denominator. It contemplates simply an estimate, determined by self interest, of the relative value and importance of the services rendered and those received. This is admitted with regard to services on the line, and if so whatever services can be exchanged, can be exchanged in the same way."

This language is thought to show that the use of transportation service as a consideration for telegraphic messages could not prop-

erly be regarded as the equivalent of a money payment necessary to meet the requirement of section 500 as a basis of taxation. We do not think the case or the language quoted apposite. The Court in the opinion cited was merely deciding what the general expression exchange of service meant, and whether it must be narrowly, meticulously and rigidly construed exactly to conform to the general rule that all rates of tariff on the same class of service should be uniform. This Court was merely pointing out that in allowing a general exchange of service between two such partners as a railroad and a telegraph company, Congress did not intend to enforce the uniformity rule strictly and require a nice mathematical or monetary equivalence between the exchanged services. The issue here is different. It concerns a tax upon telegraph messages paid for by transportation, and the question is whether such payment is a charge which can be measured, or measures itself, in money. The most significant evidence that it is, appears in the conduct of the parties themselves, for in their exchange of such services they make actual payments to each other in money above a certain amount of business, which amount itself they determine by a carefully kept account of actual services in money figures.

A lengthy argument is made that the Revenue Act and the Interstate Commerce Act are *in pari materia* and therefore that the word "charge" in the Revenue Act should be controlled by the meaning of the same word in interstate commerce legislation, which it is said it could not be satisfied by a mere exchange of service. We think this is a far cry to the proper meaning of section 500 in imposing a tax, and do not think its correct interpretation is thus assisted.

Then it is said that paragraph (c) of section 501 of the Act of 1918 prevents the imposition of this tax. That paragraph is as follows:

"(c) The Taxes imposed by section 500 shall apply to all services or facilities specified in such section when rendered for hire, whether or not the agency rendering them is a common carrier. In case a carrier (other than a pipe line) principally engaged in rendering transportation services or facilities for hire does not, because of its ownership of the goods transported, or for any other reasons, receive the amount which as a carrier it would otherwise charge, such carrier shall pay a tax equivalent to the tax which would be imposed upon the transportation of such goods, if the carrier received payment for such transportation, such tax, if it

can not be computed from the actual rates or tariffs of the carrier, to be computed on the basis of the rates or tariffs of other carriers for like services as determined by the commissioner. In the case of any carrier (other than a pipe line) the principal business of which is to transport goods belonging to it on its own account and which only incidentally renders service for hire, the tax shall apply to such services or facilities only as are actually rendered by it for hire. Nothing in this or the preceding section shall be construed as imposing a tax (1) upon the transportation of any commodity which is necessary for the use of the carrier in the conduct of its business as such and is intended to be so used or has been so used; or (2) upon the transportation of company material transported by one carrier, which constitutes a part of a railroad system, for another carrier which is also a part of the same system."

Regulation No. 49 issued by the Internal Revenue Department to carry out this paragraph was as follows:

"If a telegraph or telephone line or lines along the line of any railroad company be necessary for the use of such railroad company in the conduct of the railroad company's business as such, and if the railroad company, under contract transports commodities necessary to maintain or operate such telegraph or telephone line or lines along the line of such railroad company, such commodities being intended to be, or having been so used, and the railroad company makes no charge for such transportation, the charges which, but for such arrangement, would have accrued upon such transportation are exempt from the tax."

Paragraph (c) of section 501 is only to be found in the Revenue Act of 1918 and could not affect the validity of any taxes at issue in this case after August, 1922, when the revenue act of 1921 became applicable. In the next place, paragraph (c) with the enforcing regulation No. 49 has no application to the payment of taxes on telegraph messages. It is dealing with the transportation of goods and commodities by common carriers and the tax on rates received from their carriage. The words used make this interpretation necessary and it is supported by the fact that when in the revenue act of 1921 the taxes on freight and express shipments were repealed, this paragraph (c) was also repealed though the tax on telegraph messages was retained.

It is true that this result leaves a tax on the telegraph messages in the exchange of services and exempts receipts on the transportation side of the exchange. But Congress did not fix its taxes with reference to the particular phase of this contract by which charges for messages are balanced against those for transportation, and

doubtless had satisfactory reasons for exempting the one and not the other. The difference furnishes no ground for varying the meaning and scope of section 500 (f) or its application to the telegrams which were exchanged for the exempted transportation.

For the reasons given, the judgment of the Circuit Court of Appeals is reversed and the judgment of the District Court is restored.

A true copy.

Test:

Clerk, Supreme Court, U. S.